



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
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EDMUND G. BROWN JR., Governor
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August 1, 2016

Debra Mahnke
Central Valley Regional Water Quality Control Board
1685 "E" Street
Fresno, California 93706
Debra.Mahnke@waterboards.ca.gov

**Subject: Mitigated Negative Declaration for the Bean Creek Meadow
Restoration Project (Project)
SCH# 2016071002
Mariposa County**

Dear Ms. Mahnke:

The California Department of Fish and Wildlife (Department) has reviewed the above Mitigated Negative Declaration (MND) for the Bean Creek Meadow Restoration Project (Project) submitted by the Central Valley Regional Water Quality Control Board (CVRWQCB). Approval of the Project would allow for the restoration of approximately 3,500 feet of Bean Creek, using the "pond and plug" restoration technique to restore the hydrological function of Bean Meadow. The pond and plug technique involves the construction of a series of earthen "plugs" along the channel. The plug fill is generated from excavating the stream channel and banks immediately upstream of the earthen plug location. The excavated stream channel becomes the "pond". Approximately 40,000 cubic yards of material will be excavated to be used for nine (9) earthen plugs. In addition, approximately 1.1 acres of wetlands will be created within the existing meadow floodplain. Other Project related activities include the removal of approximately 50 ponderosa pines (ranging from 2-inches to 24-inches in stem diameter), 10 willows (ranging from 3-inches to 24-inches in stem diameter), and the transplanting recoverable native vegetation. The proposed Project site is located at 10505 Fiske Road, along Bean Creek, northeast of the community of Coulterville, Mariposa County.

Specifically, the Department is concerned with the potentially significant impacts to the State Endangered great gray owl (*Strix nebulosa*); State Threatened and federally Endangered Sierra Nevada yellow-legged frog (*Rana sierrae*); the State Species of Special Concern pallid bat (*Antrozous pallidus*) and western pond turtle (*Actinemys marmorata*); special status plants and nesting birds; and the spread of invasive species. Without avoidance, minimization, and mitigation measures, potentially significant impacts to these species could occur. The Department requests the

following recommendations be included in the California Environmental Quality Act (CEQA) document prepared for this Project as enforceable mitigation measures as appropriate. Our comments follow.

Department Jurisdiction

Trustee Agency Authority: The Department is a Trustee Agency with responsibility under CEQA for commenting on projects that could impact plant and wildlife resources. Pursuant to Fish and Game Code Section 1802, the Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of those species. As a Trustee Agency for fish and wildlife resources, the Department is responsible for providing, as available, biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used under CEQA (Division 13 [commencing with section 21000] of the Public Resources Code).

Responsible Agency Authority: The Department has regulatory authority over projects that could result in the "take" of any species listed by the State as threatened or endangered, pursuant to Fish and Game Code Section 2081. If the Project could result in the take of any species listed as threatened or endangered under the California Endangered Species Act (CESA), the Department may need to issue an Incidental Take Permit (ITP) for the Project. CEQA requires a mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (sections 21001(c), 21083, Guidelines sections 15380, 15064, 15065). Impacts must be avoided or mitigated to less than significant levels unless the CEQA Lead Agency makes and supports a Statement of Overriding Consideration (SOC). The CEQA Lead Agency's SOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code Section 2080. Issuance of an ITP is subject to CEQA review. The Department recommends that the CEQA document prepared for this Project describes and addresses the potential impacts to listed species; otherwise, preparation of a supplemental CEQA document would be necessary if issuance of an ITP is necessary.

The Department also has regulatory authority with regard to activities occurring in streams and lakes that could adversely affect any fish or wildlife resource, pursuant to Fish and Game Code sections 1600 et seq. The Project-related activities warrant notification to the Department pursuant to Fish and Game Code section 1600 et seq., which requires an entity to notify the Department prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake; (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. "Any river, stream, or lake" includes those that are episodic as well as those that are perennial. The Department is required to comply with CEQA in the issuance or the renewal of an LSA Agreement. For additional information on notification requirements, please contact our staff in the Stream Alteration Program at (559) 243 4593.

Unlisted Species: Species of plants and animals need not be officially listed as Endangered, Rare, or Threatened (E, R, or T) on any State or Federal list to be considered E, R, or T under CEQA. If a species can be shown to meet the criteria for E, R, or T as specified in the CEQA Guidelines (California Code of Regulations, Title 14, Chapter 3, and Section 15380), it ought to be fully considered in the environmental analysis for the Project. If special status animal or plant species are detected during ground disturbing activities, consultation with the Department is warranted to discuss potential avoidance, minimization, and mitigation measures.

Bird Protection: The Department has jurisdiction over actions which may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs, and nests include sections 3503 (regarding unlawful take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory non-game bird). Unless the Project-related activities will be conducted outside the bird nesting season, the Department recommends that the lead agency require appropriate avoidance and minimization measures for raptors and other nesting birds in the Project area be included in the CEQA document prepared for this Project.

Water Pollution: Pursuant to Fish and Game Code Section 5650, it is unlawful to deposit in, permit to pass into, or place where it can pass into the "Waters of the State" any substance or material deleterious to fish, plant life, or bird life, including non-native species. The Regional Water Quality Control Board (RWQCB) also has jurisdiction regarding discharge and pollution to Waters of the State including stormwater runoff into surface waters.

Recommendations

Nesting birds: The trees, shrubs, and grasses within and in the vicinity of the Project site likely provide nesting habitat for songbirds and raptors. The MND states that the Project will occur outside of the avian nesting season (February 1 through September 15), therefore no mitigation is required. Mitigation Measure (MM) BIO-1 (Pallid Bat) states tree removal will occur between October 1st and May 31st, and if trees cannot be removed outside of the pallid bats maternal roosting season, then pre-construction surveys will occur. Based on MM BIO-1, it appears tree removal may occur within the nesting bird season. The Department encourages Project implementation to occur during the non-nesting bird season. However, if ground-disturbing activities must occur during the breeding season (February through mid-September), the Project applicant is responsible for ensuring that implementation of the Project does not result in any violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above. Prior to work commencing; including staging, clearing, and grubbing, the Department recommends surveys for active nests be conducted by a qualified wildlife biologist no more than 10 days prior to the start of any ground or vegetation disturbance and that the surveys be conducted in a sufficient area around the work site to identify any nests that are present and to determine their status. A sufficient area means any nest within an area that could

potentially be affected by noise, vibration, odors, and movement of workers or equipment. Identified nests should be continuously surveyed for the first 24 hours prior to any construction related activities to establish a behavioral baseline. Once work commences, all nests should be continuously monitored to detect any behavioral changes as a result of the Project. If behavioral changes are observed, the work causing that change should cease and the Department consulted for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified biologist is not feasible, the Department recommends a minimum no disturbance buffer of 250 feet around active nests of non-listed bird species and a 500 foot no-disturbance buffer around the nests of unlisted raptors until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival. Variance from these no-disturbance buffers may be implemented when there is compelling biological or ecological reason to do so, such as when the Project area would be concealed from a nest by topography. Any variance from these buffers is advised to be supported by a qualified wildlife biologist and it is recommended the Department be notified in advance of implementation of a no disturbance buffer.

MND Mitigation Measures BIO-2 and BIO-3: MM BIO-2 includes consulting with a professional biologist on appropriate protection measures if special-status species are detected before or during project implementation. If there is the likelihood that special-status species may be impacted by project related activities, the Department recommends that species specific mitigation measures are not deferred and are incorporated into the Project design and made enforceable conditions of Project approval. We **do not** recommend that mitigation measures be developed **after the Project has been approved**, as should special-status species be detected on the Project site, the Project will need to be revised to avoid impacts to the population(s). The Department recommends the MND clearly describe when project related activities will occur, and what species specific avoidance, minimization, and mitigation measures will be implemented to minimize the potential impacts to less than significant levels. If special status species are detected, then consultation with the Department is advised to determine appropriate minimization and mitigation measures for impacts to special-status species.

MM BIO-3 includes the implementation of Limited Operation Periods (LOP) to avoid disturbances to breeding activities and habitat of special-status wildlife species. However, species specific LOPs are not listed and neither are the general LOPs. It is unclear how these mitigation measures will be implemented and made enforceable. The MND includes specific mitigation measures for the golden eagle (MM CDFW-1), great gray owl (MM CDFW-2), willow flycatcher (MM CDFW-3), northern goshawk (MM CDFW-4), California spotted owl (MM CDFW-4), and western pond turtle (MM CDFW-5). Several of the MM CDFW mitigation measures include seasonal restrictions; however, they are not listed as LOPs. The Department recommends that the LOPs for special status species are clearly defined and made enforceable conditions of Project approval.

Sierra Nevada Yellow-Legged Frog: The MND indicates that the Project area is below the elevation range of mountain yellow-legged frog (*Rana muscosa*) and that the seasonal drainage does not provide suitable habitat for this species. The taxonomy and State and Federal status in the MND for this species are incorrect. Based on morphological and genetic data, the species previously known as the 'mountain yellow-legged frog' is now recognized as two distinct species - the Sierra Nevada yellow-legged frog (*Rana Sierrae*) and the southern mountain yellow-legged frog (*Rana muscosa*) (Vredenburg et al 2007). The Project is within the range of the Sierra Nevada yellow-legged frog (SNYF). Wengert (2008) found that stream-dwelling SNYF in the Plumas National Forest infrequently moved overland long distances from the main channel of the stream. When they were observed outside of the stream channel, they were found from one (1) meter to 22 meters from the channel. A Federal Register proposal for Critical Habitat designation for the Sierra Nevada yellow-legged frog (78 FR 24522) (USFS 2013) states that upland areas adjacent to, or surrounding, breeding and non-breeding aquatic stream habitats that provide area for feeding and movement, consist of an area extending 25 meters from the bank or shoreline of the watercourse.

On February 2, 2012, the SNYF was designated as a Candidate for listing as threatened under the California Endangered Species Act by the California Fish and Game Commission (Commission). The Commission approved the listing and adopted the regulation on December 12, 2012, and the effective date for the new regulation was on April 1, 2013. There can be no take of this species without authorization from the Department through the issuance of an ITP pursuant to section 2081(b) of the Fish and Game Code. If complete avoidance of the species is not feasible, then acquisition of an ITP is warranted. The Department advises the species information in the MND be reviewed and updated so as to properly reflect the State and Federal listing of the SNYF.

Invasive Species: MM BIO-5, SOIL-2, SOIL-3, SOIL-5, SOIL-6, and HYDRO-2 indicates disturbed areas will be mulched with native material or weed-free straw (e.g. rice straw) and seeded with native species. Rice straw is commonly thought of as being free of weeds that can colonize dry-land since most aquatic weeds cannot persist without perennial water. However, weeds that prefer moist soils may be present on the earthen levees of rice fields, and seeds of these plants may be included in rice straw harvesting in the fall. Other "weed-free" straw is typically free of upland weeds. The Department has concerns regarding the use of rice straw, and other weed-free straw, in riparian, wetland, and other wet/moist areas.

Rice straw was used during post-wildfire remediation and restoration for the 2014 King Fire, and per the California Native Plant Society (CNPS) El Dorado Chapter professional botanists (D. Ayres, et al. personal communications, March 25, 2016); it is believed that the numerous invasive weeds found in the restoration area were introduced through the application of rice straw. For the King Fire, the CNPS El Dorado Chapter professional botanists recommended (1) prior to rice straw being

used, the rice fields and their levees are thoroughly inspected for upland and aquatic weeds; (2) straw from levee areas never be used; and (3) avoid applying mulch to areas susceptible to weed invasion, like riparian areas (D. Ayres, et al. personal communications, March 25, 2016). The Department recommends following the above CNPS recommendations, and that certified weed-free straw or mulch application is limited within the riparian, wetland, and other wet/moist areas. The Department further recommends native material used as mulch, such as slash created from the removal of ponderosa pine trees, is created on site. The Department highly encourages that MM BIO-6 (Control noxious and invasive weeds) is expanded to include post project monitoring and removal of non-native and invasive weeds.

Federal Endangered Species Act (FESA): The Department recommends any biological survey results also be sent to the United States Fish and Wildlife Service (USFWS), which regulates activities that may result in take of species listed under the FESA.

We appreciate the opportunity to provide recommendations for this Project. If you have any questions on these issues, please contact Margarita Gordus, Senior Environmental Scientist (Specialist), at the address provided on this letterhead, by telephone at (559) 243-4014, ext. 236, or by electronic mail at Margarita.Gordus@wildlife.ca.gov.

Sincerely,



for Julie A. Vance
Regional Manager

ec: California Department of Fish and Wildlife
Margarita Gordus, Margarita.Gordus@wildlife.ca.gov

United States Fish and Wildlife Service
Chris Nagano, Chris_Nagano@fws.gov

Literature Cited

Ayres, D., S. Perry, M. Taylor, and J. DiTomaso. California Native Plant Society, El Dorado Chapter. "Rice-mulch weeds invade Eldorado National Forest." March 2016. E-mail.

Barrett, S.C.H and D. E. Seaman. 1980. The weed flora of California rice fields. *Aquatic Botany*, 9:351-376.

Wengert, G. 2008. Habitat Use, Home Range, and Movements of Mountain Yellow-legged Frogs (*Rana muscosa*) in Bean and Spanish Creeks on the Plumas National Forest. MGW Biological report to the U.S. Forest Service. February 22, 2008.

USFWS. 2013. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sierra Nevada Yellow-legged Frog, the Northern Distinct Population Segment of the Mountain Yellow-legged Frog, and the Yosemite Toad. *Federal Register* Vol. 78, No. 80.

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